(4)

No. 95-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE SHIPBUILDERS COUNCIL OF AMERICA AND SOUTHWEST MARINE, INC. IN SUPPORT OF PETITIONER

LLOYD A. SCHWARTZ
SOUTHWEST MARINE, INC.
P.O. Box 13308
San Diego, CA 92170
(619) 238-1000

CHARLES T. CARROLL, JR.*
F. EDWIN FROELICH
WILCOX, CARROLL & FROELICH, P.L.L.C.
2011 Pennsylvania Avenue, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005

FRANKLIN W. LOSEY
General Counsel
SHIPBUILDERS COUNCIL OF AMERICA
901 North Washington Street
Suite 204
Alexandria, VA 22314
(703) 548-7447

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1621

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Shipbuilders Council of America ("SCA") and Southwest Marine, Inc. move for leave to file the Brief *Amici Curiae* in support of Petitioner, Harbor Tug and Barge Company.

The Petitioner has consented in writing to the filing of a Brief *Amici Curiae* on its behalf, and a letter of consent has been filed with the Clerk of this Court. Respondent has not so consented.

The SCA is a not-for-profit trade association whose member companies are shipbuilders, shiprepairers, and component manufacturers located in all sections of the country.

Together SCA member companies employ over 20,000 workers, all but a handful of whom are harbor workers—shipbuilders and shiprepairmen—subject to the Longshore and Harbor Workers' Compensation Act. On any given day a portion of this land-based workforce is employed on a ship, some in conjunction with a floating device, barge or similar platform moored to the ship or a pier in order to better carry out construction or repair assignments.

These employees now know that they can file both a LHWCA claim and a Jones Act claim against their employer. One employer, Southwest Marine, Inc., an SCA member, has vigorously challenged one such claim, which has been to this Court on two occasions. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138 (9th Cir. 1995), cert. denied, —— U.S. —— (Oct. 30, 1995).

Southwest Marine, Inc., and all of the other SCA members have a vital stake in the two questions now before the Court, and believe that they will be confronted routinely with Jones Act claims and LHWCA claims from those employees injured while working from, on, or otherwise in conjunction with these floating devices, unless the Ninth Circuit is reversed on both questions.

Accordingly, *Amici* respectfully move for leave to file the attached Brief *Amici Curiae* in support of Petitioner.

Respectfully submitted,

LLOYD A. SCHWARTZ
SOUTHWEST MARINE, INC.
P.O. Box 13308
San Diego, CA 92170
(619) 238-1000

CHARLES T. CARROLL, JR.*
F. EDWIN FROELICH
WILCOX, CARROLL & FROELICH, P.L.L.C.
2011 Pennsylvania Avenue, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005

FRANKLIN W. LOSEY
General Counsel
SHIPBUILDERS COUNCIL OF AMERICA
901 North Washington Street
Suite 204
Alexandria, VA 22314
(703) 548-7447

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1621

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICI CURIAE ON BEHALF OF THE SHIPBUILDERS COUNCIL OF AMERICA AND SOUTHWEST MARINE, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

The SCA is a not-for-profit trade association whose member companies are shipbuilders, shiprepairers, and component manufacturers located in all sections of the country.

Together SCA member companies employ over 20,000 workers, all but a handful of whom are harbor workers—shipbuilders and shiprepairmen—subject to the Longshore and Harbor Workers' Compensation Act. On any given day a portion of this land-based workforce is employed on a ship, some in conjunction with a floating device, barge or similar platform moored to the ship or a pier

in order to better carry out construction or repair assignments.

These employees now know that they can file both a LHWCA claim and a Jones Act claim against their employer. One employer, Southwest Marine, Inc., an SCA member, has vigorously challenged one such claim, which has been to this Court on two occasions. *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81 (1991); *Gizoni v. Southwest Marine, Inc.,* 56 F.3d 1138 (9th Cir. 1995), cert. denied, —— U.S. —— (Oct. 30, 1995).

Southwest Marine, Inc., and all of the other SCA members have a vital stake in the two questions now before the Court, and believe that they will be confronted routinely with Jones Act claims and LHWCA claims from those employees injured while working from, on, or otherwise in conjunction with these floating devices, unless the Ninth Circuit is reversed on both questions.

SUMMARY OF ARGUMENT

Notwithstanding the fact that an injured maritime employee is allowed to seek both LHWCA benefits and Jones Act relief simultaneously as this Court has recently allowed, the Congressional scheme for adjudication of LHWCA benefits requires the Department of Labor (DoL) to determine the status of a claimant as between land-based harbor worker and seaman. Once this question of status has been adjudicated by the DoL and benefits awarded, as Congress intended with enactment of the LHWCA in 1927, the question must be considered settled and the rules of issue preclusion must be applied to any subsequent Jones Act claim.

The Ninth Circuit's decision to the contrary allows a successful claimant to collaterally attack a DoL order awarding benefits. Its rule effectively centers all judicial power over maritime status in the district courts, a concentration of jurisdiction never intended by Congress. At

best this is an abuse of process and a waste of judicial resources. At worst it could result in some very absurd and unfair results clearly not intended by the Congress.

The decision below also blurs the distinction between Jones Act seamen and land-based harbor workers that this Court recently set forth in *Chandris v. Latsis,* and rejects the fleet seaman limitation accepted by two other circuits, and apparently accepted by this Court as well in *Chandris,* in favor of a broad industry-wide employment relationship test.

This Court has already considered and rejected an industry-wide employment relationship test for status, albeit in the LHWCA context involving land-based longshoremen. As the LHWCA and Jones Act remedies are mutually exclusive and the terms seaman/master/crewmember interchangeable, and status determinations under the two Acts involve the same considerations, the circuit court's industry-wide employment relationship test for status under the Jones Act must be rejected as well.

ARGUMENT

Both the Jones Act, 46 U.S.C. App. § 688, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, were enacted by Congress pursuant to its constitutional authority over admiralty matters and its responsibility to maritime workers.[1]

---

[1] The Constitution vests jurisdiction over admiralty and maritime matters with the federal courts, Art. III, Sec. 2, Cl. 1. This Court has acknowledged that the necessary and proper clause, Art. I, Sec. 8, gives Congress the paramount power to alter maritime law, and the Congress has in fact done so with both Acts. The Jones Act overturned this Court's opinion in *The Osceola*, 189 U.S. 158 (1903); later the LHWCA was enacted to address this Court's opinions that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and

Each Act provides a distinct remedy to a different class of injured maritime worker. The Jones Act supplements the traditional common law maritime remedies of unseaworthiness and maintenance and cure available to an injured seaman with a cause of action for negligence against his employer. *Chandris, Inc.* v. *Latsis,* —— U.S. —— (1995). The LHWCA, as amended, provides fixed and certain benefits to those injured land-based maritime workers who fall within the scope of the Act in exchange for limited employer tort liability. *Morrison-Knudsen Construction Co. v. Director, OWCP,* 461 U.S. 624 (1983). Together they are intended to leave no seams in maritime coverage.

Although the terms of the Jones Act do not define the limits of seaman status, the LHWCA specifically excludes from its reach, *inter alia,* a "master or member of a crew," 33 U.S.C. § 902(3)(G), a term which this Court has held is coextensive with the term "seaman," used to determine Jones Act jurisdiction. *McDermott Inc. v. Wilander,* 498 U.S. 337 (1991).

Jones Act claims rest entirely on the status of the claimant, while LHWCA claims rest on both the status of the claimant and the situs of the injury.[2] The question of status under either Act is a mixed question of law and fact. *Chandris, Inc. v. Latsis,* —— U.S. —— (1995). Slip Opinion at 21. Both Acts impose liability on the injured worker's employer.

---

that Congress could not constitutionally delegate regulation of federal maritime jurisdiction to the states, *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920). Congress subsequently tailored the LHWCA to fill the gap in injury coverage between the Jones Act and state compensation statutes, i.e., to recompense injured land-based maritime employees.

[2] The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, extended LHWCA jurisdiction shoreward of the so called *Jensen* line. Consequently, Congress placed a situs limitation on this extension. 33 U.S.C. § 903(a).

Each Act is designed to recompense its intended beneficiaries for injuries falling within its jurisdictional limitatons. The courts have long held that a maritime employee is not entitled to remedies under both Acts.[3] Thus the LHWCA and Jones Act remedies are considered mutually exclusive. *Swanson v. Marra Bros., Inc.,* 328 U.S. 1 (1946).

I. THE NINTH CIRCUIT'S VIEW OF ISSUE PRECLUSION IS UNSUPPORTABLE AND MUST BE REJECTED.

A. The Ninth Circuit's Disregard Of The Rules Of Issue Preclusion Is Incompatible With The Jurisdictional Scheme Provided By Congress.

Besides providing distinct and mutually exclusive remedies, the two Acts divide jurisdiction over maritime work-related injury claims and provide substantially different approaches to the adjudication of claims filed under the two Acts. Under the Jones Act, federal district courts are assigned exclusive jurisdiction over claims from seamen while, under the LHWCA, the DoL is assigned exclusive jurisdiction over claims from land-based maritime workers. Jones Act claims are entitled to a jury trial in the appropriate U.S. district court, while LHWCA claims are decided through an administrative adjudication conducted by the DoL.[4]

---

[3] The LHWCA provides that any recompense shall be credited against any Jones Act recovery. 33 U.S.C. § 903(e). Thus, although claimants are permitted to seek both remedies, *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81 (1991), double recovery is not permitted.

[4] The Jones Act incorporates the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51,: Originally the LHWCA provided for an administrative hearing and fact finding by a deputy commissioner with review by a district court. Congress substantially revised this process with enactment of the 1972 Amendments. See *Caputo,* 432 U.S. 249 at 254, n.3. These revisions do not alter present DoL jurisdiction or fact finding authority.

Notwithstanding this split jurisdiction between the courts and an administrative agency, Congress delegated virtually identical fact finding authority to the two triers of fact.[5] Congress authorized district courts to determine whether or not a claimant seeking Jones Act relief has the requisite seaman status to fall within the reach of this Act. Congress also delegated authority to the DoL to determine whether a LHWCA claimant has the status of a land-based harbor worker or does not by virtue of having the status of a master or member of a crew.[6] A positive finding that the claimant is a master or member of a crew, i.e., a Jones Act seaman, negates LHWCA coverage and remedies. Conversely, a positive finding that a claimant is a covered harbor worker settles the question of the claimant's Jones Act seaman status as well.

The LHWCA requires this particular fact finder to make just such a determination, as indeed the ALJ did with respondent's LHWCA claim.

The significance of the DoL's jurisdiction and Congressional expectations concerning this jurisdiction can be gleaned from the legislative history of the LHWCA. Congress considered a remedial scheme that would not have delegated to the DoL the power to make any determination of status between the two classes of maritime employee. The House Judiciary Committee considered and reported legislation to the House floor which added a provision to the Senate-passed legislation that would have given LHWCA benefits to seamen, in addition to

[5] A district court is certainly within its discretion to find that a claimant is not a covered Jones Act seaman by virtue of falling within the reach of the LHWCA, but is without jurisdiction to order LHWCA benefits. Likewise, the DoL is without jurisdiction to award Jones Act compensation even if it finds that a LHWCA claimant falls outside the scope of the Act by virtue of being a master or member of a crew.

[6] Of course a third determination is also possible, i.e., that a claimant is not a maritime employee and has neither status.

their other maritime remedies. See House Report No. 1767, 69th Congress, 2d Sess. to accompany S. 3170 (January 14, 1927). Had this provision been enacted, any determination of status—as between the two classes of maritime workers—by the DoL would, of course, be completely unnecessary.

But the Judiciary Committee's proposed amendment was later deleted on the House floor in favor of the split status approach that finally was enacted. This split is very significant for what it requires the administrative fact finder to do: determine the status—as between the two classes of maritime employee—of all claimants. Even if the question of status should not be put at issue in the administrative proceeding, a statutory prerequisite to the award of benefits by the DoL is that only a claimant with the status of a land-based maritime employee may receive LHWCA benefits. Any benefits awarded by a DoL order can only be predicated on the fact that the claimant has the necessary status of a land-based maritime worker.

Clearly, Congress fully expects this fact finder to make a status determination in each and every claim for benefits, even if it means running the risk of proceeding simultaneously with, or in advance of, a possible Jones Act claim in district court.

Recently, this Court ruled that an injured worker receiving LHWCA benefits without an administrative award is not barred from subsequently seeking to prove seaman status in order to obtain Jones Act relief, "because the question of coverage has never actually been litigated." *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).

Such is not the case below. After due consideration of the respondent's LHWCA claim, a DoL administrative law judge entered an order finding that the respondent is covered by the LHWCA and is not a master or member

of a crew, i.e., a seaman. This order was not appealed to the Benefits Review Board, and thus it has become a final order of the DoL.

As noted above, the DoL can award benefits only to those claimants falling within its Congressionally delegated jurisdiction. Land-based status is a prerequisite of DoL jurisdiction and award of benefits, and once a DoL fact finding determination and award of benefits is made, it must cut off any right of the claimant to proceed with or initiate litigation of a Jones Act claim in district court.[7] The normal rules of collateral estoppel must apply, as indeed two other circuit courts have recognized. *Sharp v. Johnson Brothers Corporation*, 973 F.2d 423 (5th Cir. 1992); *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991); *Hagens v. United Fruit Co.*, 135 F.2d 842 (2d Cir. 1943).

The Second Circuit also recognizes that estoppel principles apply in the context of a state compensation award followed by a Jones Act claim, *Roth v. McAllister Bros., Inc.*, 316 F.2d 143 (2nd Cir. 1963) (an employer who takes the position in a state compensation proceeding that a claimant is a seaman is estopped from claiming otherwise in a subsequent Jones Act proceeding). Indeed, even the Ninth Circuit recognizes judicial estoppel principles in a similar context.[8]

[7] *Amici*, as of this writing, do not know whether or not the United States will appear as an *Amicus* to this proceeding, but point out that this view of issue preclusion is entirely consistent with that taken by the United States in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). See Brief *Amicus Curiae* of the United States, p. 23.

[8] In a case decided *after* the case under review, the Ninth Circuit held that an administrative award made under a claim of total disability to a state compensation board bars a federal district court from finding otherwise in a subsequent federal cause of action, although not a Jones Act claim, in which the claimant's position was inconsistent with that taken in the administrative proceeding. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996). It is difficult to reconcile this decision with the circuit court's decision below.

Amici recognize that the same reasoning undoubtedly holds true should a district court enter judgment in a claimant's favor before the administrative process enters an order. Congress provided this dual remedial scheme, and it only works if one fact finder respects the factual conclusions of the other. The Ninth Circuit's rule is inherently incompatible with the Congressional remedial scheme, because it effectively centers all judicial power over maritime status—both Jones Act seamen and LHWCA covered harbor workers—in the district courts. Congress clearly never intended this consolidation of judicial power, and to allow it will only result in permitting some very questionable results.

B. The Ninth Circuit's View Leads To Results Neither Intended By Congress Nor Appropriate For A Sound Judicial System.

Under the Ninth Circuit's decision, the law of unintended consequences will bring results that are certain to thwart the intent of Congress and induce chaos into the legal system.

First, Congress intended, and the LHWCA so provides, that LHWCA benefits be paid quickly and voluntarily whenever possible. 33 U.S.C. § 914. Congress wanted as few claims as possible to run afoul of the administrative process. The legal regime actually works as intended; approximately 90% of claims are currently not controverted by the employer, according to DoL estimates, and the injured party receives recompense in short order, when it is most needed.

Congress, for like reasons, added a provision to the Act in 1984 permitting the parties to settle claims, even deeming DoL approval if both parties are represented by counsel. 33 U.S.C. § 908(i). Should the decision below stand, it will impair the prospect for quick and fair settle-

ments because employers will have no incentive to settle a claim, and thus fund a subsequent Jones Act suit.

Second, Congress clearly intended, and the LHWCA so provides, that review of a DoL final order awarding benefits is to the appropriate court of appeals. 33 U.S.C. § 921(c). But under the Ninth Circuit's view, a claimant who receives an award of LHWCA benefits by the DoL will also be permitted to trigger a second "review" merely by filing a Jones Act claim in a U.S. district court. Unlike appellate court review of a DoL order, this "review" is actually a *de novo* collateral attack which may be proceeding simultaneously with a § 21(c) appeal initiated by the employer.

Obviously, neither the LHWCA nor the Jones Act authorizes a U.S. district court to consider any aspect of an otherwise lawful DoL order, or to overturn an administrative finding of status by entertaining a collateral attack to an award of LHWCA benefits. At best, permitting collateral attack will only confuse the judicial process by making conflicting decisions a real possibility. At worst, it could produce one of the most absurd judicial results conceivable: a district court precluded from invoking estoppel principles when considering a collateral attack on a decision of its superior circuit court.

This is not as far-fetched as it may seem. Should a claimant seek Jones Act relief after a DoL award of benefits is made, under the circuit court's decision, the district court appears to be just as free to ignore an appellate decision upholding this award as it is free to ignore the DoL's award. There is no logical reason under the Ninth Circuit's collateral estoppel theory to treat a circuit court's LHWCA decision any differently than a DoL order.

And third of all, Congress clearly intended that all injured martime employees are to be recompensed under one statute or the other for their injuries. But it is conceivable, under the Ninth Circuit's decision, that an injured worker could file claims under both statutes but

receive nothing. For example, the DoL could conclude that the claimant is a master or member of a crew and deny LHWCA benefits. Later a jury could conclude the opposite, leading to this unintended result.

II. THE NINTH CIRCUIT'S STATUS TEST HAS NO BASIS IN MARITIME LAW AND MUST BE REJECTED.

A. The Ninth Circuit's Status Test Is No More Than An Industry-Wide Employment Relationship Test Which Two Other Circuits Have Rejected.

Jones Act liability rests on an injured claimant's status as a seaman. *Latsis*, Slip Opinion at 13. The courts have long held that the question of seaman's status is determined by the employee's relationship to a vessel in navigation or to an identifiable fleet of such vessels under common control. See *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1985); *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3rd 1247 (3rd Cir. 1994). This Court recently set forth a two part test outlining the minimum connection to a vessel, or to an identifiable group of such vessels, necessary for seaman status. See *Latsis*, Slip Opinion at 20. (See II-B, *infra*).

Once seaman status is established, liability for employment related injury flows to his/her employer as a result of the employer-employee relationship. "It is axiomatic that an employer/employee relationship is essential before liability may be imposed under the Jones Act." *Stamoulos v. Howland Panama S.A.*, 610 F. Supp. 454, 456 (E.D. La. 1985).

Both the Fifth and Third Circuits, in expressing their respective opinions concerning the fleet vessel doctrine, expressly limited fleet-based liability to the fleet owned or operated by the claimant's employer. "We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard." *Barrett* at 1074: "The key to the fleet seaman doctrine is that

the seaman maintain the employment relationship with the same employer. The term 'fleet' refers to the fleet of vesels owned by the employer, not the fleet of vessels on which the employee has worked." *Reeves* at 1256. This Court appears to have found the Fifth Circuit's limitation reasonable. *Latsis*, Slip Opinion at 21.

In rejecting this line of authoritative reasoning, the court below stretched the accepted bounds of seaman status well beyond a seaman's substantial relationship to a vessel or a group of vessels owned or operated by his employer. Rather, the court found that status may be based merely on a claimant's ongoing relationship with all of those employers who use the multi-employer hiring hall from which he was hired.[9] The court based its reasoning on the belief that, since some of these employers did, indeed, utilize the claimant's services as a Jones Act seaman from time to time, the claimant's past employment relationship to the industry is sufficient to confer seaman status, even if, at the time of the injury the claimant was not employed with a substantial relationship to a vessel in navigation, but rather as a transitory harbor worker temporarily on a vessel to scrape and paint it.

The Ninth Circuit's test for seaman status is much more expansive than that permitted by the Fifth Circuit's fleet vessel limitation. It is in fact no limitation on status at all, but an industry-wide employment relationship test.

---

[9] The Ninth Circuit's holding rests on the following premise: "There would appear to be no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a hiring hall (in this case, the Inland Boatman's Union hiring hall) should not be treated as a common employer for purposes of determining a maritime worker's seaman status. . . In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, *as well as work performed for other employers during the relevant time should be considered in making the determination.*" *Papai v. Harbor Tug*, 67 F.3d 203, 206 (emphasis added).

B. The Ninth Circuit's Status Test Blurs The Distinction Between Land-Based Maritime Workers And Jones Act Seamen Set Forth In *Latsis*, Thus Improperly Extending Jones Act Status To Land-Based Maritime Workers Who Congress Clearly Intended To Exclude From The Jurisdiction Of The Jones Act.

As noted above, with enactment of the LHWCA in 1927, Congress distinguished one class of maritime employee—a master and members of a crew—from land-based maritime workers and excluded it from LHWCA jurisdiction. Subsequently the federal courts have come to recognize that the term "master and members of a crew" is coextensive with the term "seaman" who falls within the scope of the Jones Act. See note 12, *infra*.

The land-based maritime occupations that Congress distinguished from seamen include longshoremen and harbor workers. This latter category, in turn, includes shipbuilders, shiprepairmen and ship-breakers. 33 U.S.C. § 902(3). This section of the LHWCA also specifically excludes certain classes of employees that Congress found ought not to be subject to U.S. maritime jurisdiction and statutory remedies.

Congress intended to make as sharp a distinction as possible between the two classes of maritime workers in excluding seamen from the reach of the LHWCA. (See I-A). Since enactment of the LHWCA in 1927, the federal courts have spent considerable energy wrestling with the problem of defining exactly what job attributes define a Jones Act seaman, culminating in this Court's recent opinion in *Chandris, Inc. v. Latsis*, —— U.S. —— (1995).

Latsis enunciates a two part test for seaman status, the first of which ("an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission") is a rather wide open gate establishing eligibility, and the second of which ("connection to a vessel

in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature") is a narrow funnel limiting Jones Act coverage to those seamen whom Congress intended to be covered by the Act.

It is clear that this Court intends that the second part of this test fully reflect the Congressional purpose of the Jones Act:

> "The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Latsis* at 21.

Amici submit that an employee hired only to maintain a ship or tug boat moored or at anchor on a daily or other temporary basis, and not a part of the ship's crew or a permanent employee of the fleet operator with a substantial connection to one or more vessels in his employer's fleet, completely fails both elements ("substantial in terms of both *duration and nature*") of the second part of the *Latsis* test—as a matter of law. Harbor workers with a connection to a vessel this insubstantial have no real possibility of ever being exposed "regularly to the perils of the sea" as envisioned by this Court's jurisprudence, and ought not be allowed to prove status to a jury.[10]

[10] In *Latsis* this Court stated that, as to the temporal element of this test, district courts are justified in granting summary judgment or a directed verdict "where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to [a vessel] in navigation [.]" Slip opinion at 24. *Amici* submit that applying this same observation to the second element, i.e., "substantial in terms of . . . nature," and encouraging district courts to treat claims inadequate on this point in a like fashion would go a long way toward clarifying the Jones Act/LHWCA status conundrum still confusing the courts.

The decision below simply eviscerates the second prong of the *Latsis* test by allowing an industry-wide Jones Act status test to trump the intent of Congress, as interpreted by this Court, i.e., that an essential requirement of seaman status is a substantial connection to a vessel in terms of both duration *and* nature. It completely blurs the distinction between Jones Act seaman and LHWCA covered harbor workers, and entangles the two remedial schemes created by Congress. Unless this Court clearly rejects the Ninth Circuit's status test, *Amici* believe that numerous land-based harbor workers will be able to claim seaman status and seek Jones Act relief.

Additionally, the decision below opens the door to imposing Jones Act liability on every maritime employer for a claimant's past status. While it does recognize that Jones Act liability runs only to the injured claimant's employer and not to the maritime industry in general or to any given group of such employers within a specific hiring hall relationship, this limitation is illusory at best. At the very least, the Ninth Circuit's industry-wide status test effectively places Jones Act liability on the particular employer (of the group of employers utilizing the hiring hall) who employed the claimant at the point of the injury, regardless of claimant's status at the point of injury. Thus this employer becomes liable solely because of the claimant's past employment history.

Equally troubling, the circuit court's analysis potentially opens the door to spurious allegations of liabiilty that could ensnare *any* employer in the entire maritime industry.[11] Should this Court find it acceptable, shipbuilders

[11] Seaman status appears to be an open ended proposition under the Ninth Circuit's test ("If the type of work a maritime worker customarily performs would entitle him to seaman status. . ."). *Amici* are fearful that any maritime employer, such as a shipbuilder or shiprepairer, whose employees are generally subject to the LHWCA, some of whom work as needed on a ship or a floating barge or similar device fixed to a pier or ship, will be victimized by the Ninth Circuit's status test. In addition, the Ninth Circuit's

and shiprepairers believe that they will be routinely besieged with Jones Act claims from their land-based employees injured while temporarily aboard a ship or a floating platform to perform their assigned ship construction or repair duties. Thus the Ninth Circuit's status test does indeed impose broad industry-wide Jones Act liability.

C. This Court Rejected An Industry-Wide Employment Relationship Test For Status In The LHWCA Context, And Must Reject It In The Jones Act Context As Well.

The court below rested its decision on the premise that membership in a maritime union which sends members to employers through a multi-employer hiring hall, on an as needed basis, to perform many different jobs including that of a seaman and, as below, general maintenance work on ships, is sufficient to confer Jones Act status. According to the Ninth Circuit, it is the claimant's past overall employment relationship to other employers in the industry that determines seaman status, and not his employment relationship to his employer at the time of the injury.

This Court rejected a virtually identical status argument made in the LHWCA context during its initial review of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576. These amendments substantially revised LHWCA status, extending it shoreward. In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, (1977), a multi-employer hiring hall union argued to the Court that status should be based specifically "on the employment relationship between unit employees and their stevedore and terminal employers []" with the only relevant question to the determination of status being "whether or not the injury was an outgrowth

---

open ended time frame ("the relevant time period") is vague to the point of giving no assurance whatsoever of a reasonable temporal limitation.

of [this] employment relationship." See Brief *Amicus Curiae* of the International Longshoremen's Association p. 9.

The Court saw fit to address *Amicus*' argument and dismissed the suggested test as not proper in light of the purposes of the LHWCA, with the following comment: "We find consideration of the purposes [of the recently enacted status provisions] more enlightening than looking simply at whether respondents belong to [a union] . . . The vagaries of union jurisdiction are unrelated to the purposes of the Act." 432 U.S. 268, n. 30.

Amici suggest that, as the Jones Act and the LHWCA share a common remedial purpose, although focused at the two different classes of maritime employee noted above, and as seaman status under the two Acts is hopelessly entwined,[12] the same rational that led the Court to reject an industry-wide status test under the LHWCA must be applied to the question of seaman status as well. Rejection in the Jones Act context is as warranted as it is in the LHWCA context.

---

[12] "Master or member of a crew is a refinement of the term seaman in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus it is odd but true that the key requirement for Jones Act coverage now appears in [the LHWCA]." *McDermott International v. Wilander*, —— U.S. —— (1991), Slip Opinion at 9-10, internal quotations omitted.)

CONCLUSION

The Ninth Circuit's views are unsupportable for all of the aforementioned reasons. Therefore, *Amici* respectfully submit that the decision below must be reversed on both questions.

Respectfully submitted,

LLOYD A. SCHWARTZ
SOUTHWEST MARINE, INC.
P.O. Box 13308
San Diego, CA 92170
(619) 238-1000

CHARLES T. CARROLL, JR.*
F. EDWIN FROELICH
WILCOX, CARROLL & FROELICH, P.L.L.C.
2011 Pennsylvania Avenue, N.W.
Suite 301
Washington, D.C. 20006
(202) 296-3005

FRANKLIN W. LOSEY
General Counsel
SHIPBUILDERS COUNCIL OF AMERICA
901 North Washington Street
Suite 204
Alexandria, VA 22314
(703) 548-7447

* Counsel of Record